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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA DAVIS BLAND,

Defendant and Appellant.

C089675

(Super. Ct. No. CH036650)

Defendant Joshua Davis Bland pleaded guilty to one count of battery on a nonconfined person by a prisoner and admitted a prior strike. Defendant's sole contention on appeal is that the trial court violated his due process rights by imposing a \$300 restitution fine without determining his ability to pay. We will modify the judgment to impose two mandatory fees, and otherwise affirm.

## PROCEDURAL BACKGROUND

Pursuant to a negotiated plea, defendant pleaded guilty to one count of battery on a nonconfined person by a prisoner (Pen. Code, § 4501.5)<sup>1</sup> and admitted a prior strike allegation (§ 667, subds. (b)-(i)). The remaining count and strike allegation were dismissed. The trial court imposed the middle term of three years, doubled for the strike, to run consecutive to the term defendant was already serving. The court imposed the \$300 restitution fine (§ 1202.4, subd. (b)) that is at issue here, but ordered that the “operation and conviction fees are waived in the interest of justice pursuant to 1202.4.”

After filing notice of appeal, defendant filed a request with the trial court pursuant to section 1237.2 for a reduction of the restitution fine on the grounds he now raises on appeal. The court denied the request.

## DISCUSSION

Defendant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 to challenge the imposition of the minimum restitution fine on due process grounds, arguing it must be reversed on appeal pending an ability to pay hearing. The People argue defendant forfeited his *Dueñas* claim by failing to object on due process grounds or even express any concern about inability to pay in the trial court. Defendant responds that if his claim is forfeited, then he suffered ineffective assistance of counsel. The People further argue his claim regarding the restitution fine does not implicate due process but rather, should be evaluated under the excessive fines clause and fails under that clause. Finally, the People argue that even if analyzed under due process principles, the restitution fine was constitutionally imposed.

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

Regardless of whether defendant forfeited the issue,<sup>2</sup> we are not persuaded the analysis outlined in *Dueñas* is correct. Our Supreme Court is now poised to resolve this question, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, which disagreed with the court's conclusion in *Dueñas* that due process requires the trial court to conduct an ability to pay hearing, reasoning that because a restitution fine is intended to punish defendants, a defendant should challenge such fines under the excessive fines clause of the Eighth Amendment. (*Id.* at pp. 96-97.)

We join the courts that have concluded that *Dueñas* was wrongly decided. (See, e.g., *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-282; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326-327, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-929.) The *Dueñas* court held that due process requires the trial court to stay execution of any restitution fines unless it ascertains by hearing the defendant's ability to pay those assessments and fines. (*People v. Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1169-1171.) To support this conclusion, *Dueñas* relied on two lines of due process precedent. First, it cited authorities addressing access to courts and waiving court costs for indigent civil litigants. Second, it relied on due process and equal protection authorities that prohibit incarceration based on a defendant's indigence and inability to pay a fine or fee. (*Id.* at pp. 1165-1166, 1168.)

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<sup>2</sup> Defendant disputes that there was any forfeiture. We decline to decide whether there was any forfeiture; even if there were, because defendant also now raises an ineffective assistance claim, we would exercise our discretion to address the issue on the merits. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1192.)

In *People v. Hicks*, *supra*, 40 Cal.App.5th 320, the court of appeal rejected the reasoning of *Dueñas* under both lines of due process authority. *Hicks* observed that imposition of fees after a determination of guilt does not deny a criminal defendant's access to the courts and does not interfere with a defendant's right to present a defense or challenge a trial court's rulings on appeal. (*Id.* at p. 326.) Further, imposition of fees, without more, does not result in incarceration for nonpayment of fines and fees due to indigence; thus, it does not infringe on a fundamental liberty interest. (*Ibid.*)

We find the reasoning in *Hicks* sounder and more persuasive than that in *Dueñas*. Accordingly, we conclude the imposition of a restitution fine on an indigent defendant without consideration of ability to pay does not violate due process and there is no requirement the trial court conduct an ability to pay hearing prior to imposing such a fine.

We note that the trial court purported to waive the \$40 court operations assessment (§ 1465.8) and the \$30 court facilities assessment (Gov. Code, § 70373), pursuant to section 1202.4, but that section deals with restitution fines and does not confer discretion to waive unrelated fees that are otherwise mandatory. These are mandatory assessments that may properly be added on review. (*People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543, fn. 2.) We shall modify the judgment accordingly.

## **DISPOSITION**

The judgment is modified to impose a \$40 court operations assessment under section 1465.8, and a \$30 court facilities assessment under Government Code section 70373. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

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/s/  
Duarte, J.

We concur:

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/s/  
Hull, Acting P. J.

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/s/  
Krause, J.